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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 Aqua Connect, Inc.,) CV 11-5764 RSWL (MANx)
12)
13 Plaintiff,) **ORDER Re: Defendants'**
14 v.) **Motion in Limine No. 2**
15) **to Exclude Improper**
16 Code Rebel, LLC; Arben) **Character Evidence [191]**
17 Kryeziu; Volodymyr Bykov;
18 and Does 1 through 300)
19 inclusive,)
20 Defendants.)
21 _____)

22 Currently before the Court is Defendants' Motion in
23 Limine to Exclude Improper Character Evidence [191].
24 The Court, having reviewed all papers submitted
25 pertaining to this Motion and having considered all
26 arguments presented to the Court, **NOW FINDS AND RULES**
27 **AS FOLLOWS:**

28 The Court **GRANTS IN PART AND DENIES IN PART**
29 Defendants' Motion in Limine.

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I. Background

Both Plaintiff and Defendants sell and market software. Second Amended Compl. ("SAC") ¶¶ 3, 6. Defendant Kryeziu is the managing partner and the only member of Defendant Code Rebel. According to the SAC, Defendant Bykov is a resident of Russia and worked as an agent of Defendant Code Rebel and "at the behest of Defendant Kryeziu." Id. ¶¶ 4, 7.

Plaintiff alleges that Defendant Bykov, in his capacity as an agent of Defendant Code Rebel, downloaded a free, fourteen-day trial version of Plaintiff's Aqua Connect Terminal Server ("ACTS") software on or about January 24, 2008. Id. ¶ 7. ACTS allows users to interact with Apple Mac computers and/or servers. Defs.' Stmt. of Uncontroverted Facts and Conclusions of Law ("SUF") ¶ 3. Before installing ACTS, Defendant Bykov agreed to an End User License Agreement ("EULA"), which forbids reverse engineering. See SAC ¶¶ 8, 10, Ex. 1. Plaintiff claims all Defendants colluded to reverse engineer ACTS and create a competing software product, IRAPP TS, in violation of the EULA. Id. ¶ 11. According to Defendants, IRAPP TS allows users to view and fully interact with remote or locally networked Mac OS X terminal servers. SUF ¶ 2.

Based on Defendants' alleged reverse engineering of ACTS and subsequent distribution of IRAPP TS, Plaintiff brings this current Action against Defendants for (1) breach of contract; (2) false promise; (3) unfair

1 competition under California Business and Professions
2 Code § 17200; and (4) unjust enrichment.

3 **II. Legal Standard**

4 A court may make a definitive ruling on the record
5 admitting or excluding evidence, either at or before
6 trial. Fed. R. Evid. 103. Regardless of a court's
7 initial decision on a motion in limine, however, it may
8 revisit the issue at trial. See Luce v. United States,
9 469 U.S. 38, 41-42 (1984) ("[E]ven if nothing
10 unexpected happens at trial, the district court is
11 free, in the exercise of sound judicial discretion, to
12 alter a previous limine ruling."). "The Supreme Court
13 has recognized that a ruling on a motion in limine is
14 essentially a preliminary opinion that falls entirely
15 within the discretion of the district court." United
16 States v. Bensimon, 172 F.3d 1121, 1127 (9th Cir. 1999)
17 (citing Luce, 469 U.S. at 41-42).

18 For purposes of trial, only relevant evidence is
19 admissible. Fed. R. Evid. 402. Evidence is relevant
20 if it is probative - having "any tendency to make a
21 fact more or less probable than it would be without the
22 evidence" - and material - "of consequence in
23 determining the action." Fed. R. Evid. 401.

24 Federal Rule of Evidence 404(a)(1) provides that
25 "[e]vidence of a person's character or character trait
26 is not admissible to prove that a person acted in
27 accordance with the character or trait." Similarly,
28 Federal Rule of Evidence 404(b)(1) provides that

1 "[e]vidence of a crime, wrong, or other act is not
2 admissible to prove character in order to show that on
3 a particular occasion the person acted in accordance
4 with the character."

5 However, evidence of specific acts is admissible
6 for other purposes, "such as proving motive,
7 opportunity, intent, preparation, plan, knowledge,
8 identity, absence of mistake, or lack of accident."
9 Fed. R. Evid. 404(b)(2).

10 Alternatively, under Federal Rule of Evidence 406,
11 "[e]vidence of a person's habit or an organization's
12 routine practice may be admitted to prove that on a
13 particular occasion the person or organization acted in
14 accordance with the habit or routine practice." This
15 evidence may be admitted without corroboration or
16 eyewitness. Id. In other words, habit evidence may be
17 admitted to prove acts in accordance with the habit.

18 **III. Analysis**

19 Defendants seek to exclude all evidence regarding:
20 (1) CherryOS, PearPC, and Maui X-Stream, (2) a
21 purported conflict between Defendants and Apple, and
22 (3) any other references to wrongful acts committed by
23 Defendants. Defendants base their Motion on Federal
24 Rule of Evidence 404.

25 **A. CherryOS, PearPC, and Maui X-Stream Evidence**

26 The Court finds that evidence regarding CherryOS,
27 PearPC, and Maui X-Stream may be admitted pursuant to
28 Federal Rule of Evidence 404(b)(2).

1 The Ninth Circuit has held that "other act"
2 evidence may be admitted pursuant to Rule 404(b) if the
3 following test is satisfied: "(1) there must be
4 sufficient proof for the jury to find that the
5 defendant committed the other act; (2) the other act
6 must not be too remote in time; (3) the other act must
7 be introduced to prove a material issue in the case;
8 and (4) the other act must, in some cases, be similar
9 to the offense charged." Duran v. City of Maywood, 221
10 F.3d 1127, 1132-33 (9th Cir. 2000).

11 Furthermore, as the Ninth Circuit has indicated,
12 "Rule 404(b) is a rule of inclusion... Once it has been
13 established that evidence offered serves" to prove a
14 permitted purpose, "the 'only' conditions justifying
15 the exclusion of the evidence are those described in
16 Rule 403: unfair prejudice, confusion of the issues,
17 misleading the jury, undue delay, waste of time, or
18 needless presentation of cumulative evidence." United
19 States v. Cherer, 513 F.3d 1150, 1157 (9th Cir. 2008)
20 (quoting United States v. Curtin, 489 F.3d 935, 944
21 (9th Cir. 2007)).

22 For the first element of the Duran test, where a
23 party seeks to introduce "other act" evidence under
24 Rule 404(b), the Court applies the test for conditional
25 relevancy found in Rule 104(b). Huddleston v. United
26 States, 485 U.S. 681, 689-690 (1988). In other words,
27 the Court "simply examines all the evidence in the case
28 and decides whether the jury could reasonably find the

1 conditional fact... by a preponderance of the
2 evidence." Id. at 690.

3 The Court finds that the first element of the Duran
4 test is established as Plaintiff's expert report by
5 Kristian Hermansen presents sufficient proof of shared
6 source code between PearPC and CherryOS for a jury to
7 find that Maui X-Stream took PearPC source code for
8 CherryOS without proper attribution. Houkom Decl. in
9 Support of Motion in Limine No. 12 [190], Ex. A at 1.
10 For example, the Report finds many shared error
11 messages embedded in CherryOS that can be traced back
12 to PearPC and other open source software. Id. at 5-13.
13 A reasonable jury could thus conclude that Maui X-
14 Stream took PearPC source code without proper
15 attribution.

16 Addressing the second element of the Duran test,
17 the Court finds that the Maui X-Stream incident is not
18 too remote in time from the acts alleged in the instant
19 case to mandate exclusion. Gaps of up to thirteen
20 years between the "other act" and a case at hand have
21 been found to be not too remote. See United States v.
22 Ross, 886 F.2d 264, 267 (9th Cir. 1989) (finding that
23 in a case where the defendant was charged with
24 improperly using his wife's social security number,
25 evidence he had also done so thirteen years prior was
26 not too remote in time to require exclusion). In
27 contrast, the Defendants are alleged to have violated
28 the EULA in 2008, three years after the Maui X-Stream

1 incident. SAC ¶¶ 7-12. Also, Defendant Code Rebel's
2 website indicates that Kryeziu conceived of IRAPP TS in
3 2005, around the same time that Maui X-Stream was
4 accused of impropriety. Hagemann Decl., Ex. 1.

5 With respect to the third Duran element, the Court
6 finds that this evidence may be offered to prove a
7 material issue: Defendant Kryeziu's knowledge about the
8 taking of open source code without proper attribution,
9 how to spot such activities by his coders, and whether
10 he directed or participated in any reverse engineering.
11 As CTO of Maui X-Stream during the "Cherry OS debacle,"
12 Defendant Kryeziu presumably would have knowledge about
13 the taking of open source code without proper
14 attribution and how to spot such activities by his
15 coders. Kryeziu Dep. 157:22. The Ninth Circuit has
16 recognized that prior acts may be used to establish
17 that a party has specialized knowledge of how a
18 particular activity was conducted. See United States
19 v. Martinez, 182 F.3d 1107, 1112 (9th Cir. 1999)
20 (reasoning that prior convictions for importing drugs
21 tended to prove specialized knowledge of how drugs are
22 imported and, therefore, knowledge of courier's drug
23 possession). Here, the evidence suggests that
24 Defendant Kryeziu has specialized knowledge of using
25 third party source code. Given that Defendant Kryeziu
26 states that he extensively monitors the operations at
27 Defendant Code Rebel, it would be unlikely for him to
28 not know whether Defendant Code Rebel's programmers

1 were reverse engineering ACTS or other third party
2 code. Proof of such knowledge would tend to establish
3 Defendant Kryeziu and Defendant Code Rebel's collusion,
4 collaboration, or direction in the reverse engineering
5 at issue.

6 Alternatively, evidence covered by Federal Rule of
7 Evidence 404(b) "may be used for impeachment purposes."
8 United States v. Gay, 967 F.2d 322, 328 (9th Cir. 1992)
9 citing United States v. Stockton, 788 F.2d 210, 219 n.
10 15 (4th Cir. 1985). The Maui X-Stream evidence is
11 necessary to explain why Defendant Kryeziu would
12 describe such elaborate means of monitoring his
13 programmers. Moreover, it would make Defendant Bykov's
14 denial that such monitoring efforts were ever
15 implemented all the more convincing in impeaching
16 Defendant Kryeziu's credibility.

17 The Court also finds that the fourth element of the
18 Duran test is satisfied. The Maui X-Stream incident is
19 similar to the facts in the instant case. In both
20 cases, Defendant Kryeziu's company was accused of
21 stealing free software. SAC ¶ 7; Houkom Decl. in
22 Support of Motion in Limine No. 12 [190], Ex. A at 1.
23 Additionally, at least as presented in Plaintiff's
24 expert reports, the conduct in the Maui X-Stream case
25 was very similar to the reverse engineering in the
26 instant case. Id.; Houkom Decl. in Support of Motion
27 in Limine No. 8, [207] Ex. A.

28 Because the Court finds all four elements of the

1 Duran test are met, Plaintiff's evidence regarding
2 CherryOS, PearPC, and Maui X-Stream is admissible under
3 Rule 404(b)(2). As such, the Court need not determine
4 whether the evidence would additionally be admissible
5 under Rule 406.

6 The Court also finds that the prejudicial effect of
7 the evidence here does not substantially outweigh its
8 probative value. The key to Rule 403 is not whether
9 evidence is prejudicial to a party - for almost all
10 adverse evidence is - but whether the evidence's
11 "probative value is substantially outweighed by the
12 danger of unfair prejudice." Batiz v. Am. Commer. Sec.
13 Servs., 776 F.Supp.2d 1087, 1092 (C.D. Cal. 2011).

14 The Court finds that the danger of unfair prejudice
15 presented by the evidence here does not substantially
16 outweigh the evidence's probative value. Evidence
17 concerning code misappropriation at Maui X-Stream
18 suggests that Defendant Kryeziu had the requisite
19 knowledge to notice and stop any reverse engineering
20 taking place at Defendant Code Rebel. Thus, such
21 evidence is probative. However prejudicial the Maui X-
22 Stream evidence may be, that Court finds that such
23 prejudicial effect does not substantially outweigh its
24 probative value.

25 Accordingly, the Court **DENIES** Defendants' Motion
26 with respect to excluding evidence of CherryOS, PearPC,
27 and Maui X-Stream. Defendants may raise this objection
28 again if it appears Plaintiff's sole purpose in

1 presenting this evidence is to show Defendants in a bad
2 light.

3 **B. Evidence of Purported Conflict Between Defendants**
4 **and Apple**

5 Defendants also seek to exclude all references to
6 purported conflicts between Defendants and Apple. The
7 Court construes this to refer to Plaintiff's expert
8 report by Lee Gummerman, which concludes that
9 Defendants reversed engineered Apple's OS X operating
10 system and breached Apple's End User License Agreement
11 ("EULA").

12 The Court finds that evidence of Defendants'
13 reverse engineering of Apple's OS X - and their
14 corresponding breach of Apple's EULA - is admissible
15 under Federal Rule of Evidence 404.

16 The Court first finds that, as to Rules 401 and
17 402, the evidence of Defendants' reverse engineering of
18 Apple's OS X is highly relevant. The reverse
19 engineering of Apple's OS X was Defendant Bykov's
20 asserted method of obtaining the APIs used in IRAPP TS.
21 Houkom Decl. in Support of Motion in Limine No. 8,
22 [207] Ex. A at 6. Defendant Bykov's testimony is
23 strongly contradicted, and thus impeachable, by the
24 Report; therefore it is more likely that Defendant
25 Bykov reverse engineered ACTS. Even if Defendant
26 Bykov's story were accurate, he would not only be more
27 knowledgeable about reverse engineering in general, but
28 also about reverse engineering software in the Apple

1 ecosystem. Likewise, reverse engineering is the key
2 issue in this case, meaning that evidence suggesting
3 reverse engineering occurred is certainly relevant.

4 As to Rule 404, the Court again applies the Duran
5 test for "other act" evidence.

6 The Court finds that the first element of the Duran
7 test is satisfied. The Gummerman Report presents
8 sufficient evidence that Defendant Bykov reverse
9 engineered Apple's OS X. The report analyzes Defendant
10 Bykov's actions with respect to discovering the
11 existence and attributes of several APIs. Houkom Decl.
12 in Support of Motion in Limine No. 8, [207] Ex. A.
13 Additionally, the report concludes that Defendant
14 Bykov's methods needed reverse engineering of OS X or
15 of ACTS to be successful. Id. Thus, a reasonable jury
16 could find that Defendants reverse engineered Apple's
17 OS X.

18 The Court also finds the second Duran element
19 satisfied. The reverse engineering of Apple's OS X
20 allegedly occurred in conjunction with the reverse
21 engineering of ACTS. Houkom Decl. in Support of Motion
22 in Limine No. 8, [207] Ex. A, at 5-7. Therefore,
23 because the two acts occurred at the same time, they
24 cannot be too remote to warrant exclusion of the
25 evidence of the reverse engineering of Apple's OS X.

26 The Court finds that the third element of the Duran
27 test is also met. This evidence may be used as
28 impeachment evidence to contradict Defendant Bykov's

1 asserted method of finding the APIs at issue, as
2 permitted by Federal Rule of Evidence 404(b). Gay, 967
3 F.2d at 328.

4 The Court finds that the fourth element is also
5 satisfied because the alleged reverse engineering of
6 Apple's OS X is precisely the conduct alleged to have
7 occurred with the ACTS software.

8 The last issue is whether the evidence can weather
9 Rule 403 scrutiny. Cherer, 513 F.3d at 1157.

10 The Court finds that with respect to the assertion
11 that Defendants reverse engineered OS X, the danger of
12 unfair prejudice does not substantially outweigh the
13 probative value. Defendant Bykov's alleged reverse
14 engineering of Apple's OS X establishes his knowledge,
15 and thus competency, in reverse engineering.
16 Furthermore, it shows that Defendant Bykov knew how to
17 reverse engineer in the Apple ecosystem. However
18 prejudicial the evidence of reverse engineering of
19 Apple's OS X may be, the danger of such prejudice does
20 not substantially outweigh its probative value.

21 Accordingly, the Court **DENIES** Defendants' Motion
22 with respect to evidence regarding Defendants' reverse
23 engineering of OS X.

24 However, the Court finds that the prejudicial
25 effect of the evidence substantially outweighs the
26 probative value with respect to Defendants' alleged
27 breach of Apple's EULA. Defendants' purported breach
28 of the Apple EULA is not at issue in this case. Even

1 if Defendants actually did breach the Apple EULA, that
2 issue is not material; it is collateral to the issues
3 to be raised at trial. Such evidence is likely to
4 mislead a jury or confuse the issues.

5 Accordingly, the Court **GRANTS** Defendants' Motion
6 with respect to any mention that Defendants breached
7 Apple's EULA.

8 **C. Any Other Character Evidence**

9 The Court **DENIES** the Motion with respect to any
10 evidence referencing any other purportedly wrongful
11 acts allegedly committed by any of the Defendants.
12 Defendants neither identify what this evidence is nor
13 specify how Plaintiff intends to offer this evidence.
14 Furthermore, as Rule 404(b)(2) clearly contemplates,
15 character evidence is not categorically excluded. Fed.
16 R. Evid. 404(a)(2), (b)(2). Additionally, character
17 evidence may still be offered as long as it is not used
18 to prove a person acted in accordance with that
19 character. Fed. R. Evid. 404(a)(1).

20 **IV. Conclusion**

21 For the reasons stated above, the Court **DENIES**
22 Defendants' Motion in Limine to Exclude Improper
23 Character Evidence with respect to evidence regarding
24 CherryOS, PearPC, and Maui X-Stream, **DENIES** the Motion
25 with respect to evidence regarding Defendants' reverse
26 engineering of Apple's OS X, **GRANTS** the Motion with
27 respect to any mention that Defendants breached Apple's
28 EULA, and **DENIES** the Motion with respect to any

1 evidence referencing any other purportedly wrongful
2 acts allegedly committed by any of the Defendants.

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5 **IT IS SO ORDERED.**

6 DATED: August 28, 2013

7
8 RONALD S.W. LEW

9 HONORABLE RONALD S.W. LEW
Senior, U.S. District Court Judge